American Bar Association
www.supremecourtpreview.org

No. 08-310

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Alaska

BRIEF FOR RESPONDENT

WILLIAM M. WALKER
DEBRA J. FITZGERALD
CRAIG W. RICHARDS
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether an *ad valorem* property tax that falls on numerous types of property, including vessels, violates the Tonnage Clause.

2. Whether an *ad valorem* property tax that apportions the property's value in proportion to its physical presence and commercial activities in each tax situs violates the Commerce Clause or the Due Process Clause.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

SUMMARY OF ARGUMENT 9

ARGUMENT 15

I. VALDEZ'S PROPERTY TAX DID NOT VIOLATE THE TONNAGE CLAUSE 15

A. The Tonnage Clause Does Not Apply To Property Taxes On Vessels 16

B. Petitioner's Attempt To Engraft A "Nondiscrimination" Rule Onto The Tonnage Clause Could Not Impugn The City's Tax And Fails As A Matter Of Law 23

1. Valdez's Property Tax Did Not Single Out Vessels For Taxation 23

2. The Tonnage Clause Does Not Prohibit States From Levying *Ad Valorem* Taxes Only On Vessels 25

II. THE CITY'S APPORTIONMENT FORMULA SATISFIED BOTH THE DUE PROCESS CLAUSE AND COMMERCE CLAUSE 31

A. The City Taxed Only That Portion Of A Vessel's Value Attributable To The Vessel's Productive Commercial Activities Within The City 32

B. The City's Apportionment Formula Did Not Create A Risk Of Duplicative Taxation 44

C. Petitioner's Argument That The Valdez Tax Should Have Accounted For Repairs Or Strikes Is Not Properly Before The Court And Is Meritless In Any Event 50

CONCLUSION 52

TABLE OF AUTHORITIES

Page(s)

CASES

Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590 (1954).....37, 43

Cannon v. New Orleans, 87 U.S. (20 Wall.) 577 (1874).....20

Cent. R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962).....*passim*

Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935).....10, 20, 26, 29

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).....25

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983).....36

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).....23

Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978) 30, 31

Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980).....22

Fargo v. Hart, 193 U.S. 490 (1904).....39

Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U.S. 217 (1908) 40

Goldberg v. Sweet, 488 U.S. 252 (1989).....33, 36

Great N. Ry. Co. v. Weeks,
297 U.S. 135 (1936).....36

Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931).....12, 33

Hays v. Pac. Mail S.S. Co.,
58 U.S. (17 How.) 596 (1854).....48

Heath v. Alabama,
474 U.S. 82 (1985).....51

Hicks v. Miranda,
422 U.S. 332 (1975).....35

Huse v. Glover,
119 U.S. 543 (1886).....16, 17, 31

Inman S.S. Co. v. Tinker,
94 U.S. 238 (1877).....17, 18, 20, 25

Japan Line, Ltd. v. L.A. County,
441 U.S. 434 (1979).....15, 48, 51

Johnson Oil Ref. Co. v. Oklahoma,
290 U.S. 158 (1933).....38

Luckenbach S.S. Co. v. Franchise Tax Bd.,
219 Cal. App. 2d 710 (Dist. Ct. App. 1963)...13, 35

Luckenbach S.S. Co. v. Franchise Tax Bd.,
377 U.S. 215 (1964).....13, 35

Mandel v. Bradley,
432 U.S. 173 (1977) (per curiam) 35

MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498 (2008).....33, 36, 44

Michael M. v. Superior Court,
450 U.S. 464 (1981).....29

Michelin Tire Corp. v. Wages,
423 U.S. 276 (1976).....30

Miller Brothers Co. v. Maryland,
347 U.S. 340 (1954).....33

Moorman Mfg. v. Bair,
437 U.S. 267 (1978).....*passim*

Morgan v. Parham,
83 U.S. (16 Wall.) 471 (1872).....21

Morgan's S.S. Co. v. La. Bd. of Health,
118 U.S. 455 (1886).....17

Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940).....33, 45

New York ex rel. N.Y. Cent. & Hudson River R.R. Co. v. Miller,
202 U.S. 584 (1906).....13, 41, 49

Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317 (1968) .....*passim*

N.W. Airlines, Inc. v. Minnesota,
322 U.S. 292 (1944).....43

Okla. Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995).....15, 36, 40, 41, 42

Ott v. Miss. Valley Barge Line Co.,
336 U.S. 169 (1949).....36, 45, 47

Packet Co. v. Keokuk,
95 U.S. 80 (1877).....10, 16, 21

The Passenger Cases,
48 U.S. (7 How.) 283 (1849).....18

Pullman's Palace Car Co. v. Pennsylvania,
141 U.S. 18 (1891).....36

Quill Corp. v. North Dakota,
504 U.S. 298 (1992).....25, 33

R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986).....35

Rowley v. Chicago & N.W. Ry. Co.,
293 U.S. 102 (1934).....36

S.S. Co. v. Portwardens,
73 U.S. (6 Wall.) 31 (1867).....10, 16, 17

State Tonnage Tax Cases,
79 U.S. (12 Wall.) 204 (1871).....*passim*

Transp. Co. v. Parkersburg,
107 U.S. 691 (1882).....28, 29

Transp. Co. v. Wheeling,
99 U.S. 273 (1878).....*passim*

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).....15, 49

Union Tank Line Co. v. Wright,
249 U.S. 275 (1919).....38, 39

Westinghouse Elec. Corp. v. Tully,
466 U.S. 388 (1984).....45

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 .....*passim*

U.S. Const. art. I, § 8.....*passim*

U.S. Const. art. I, § 10, cl. 2 .....29, 30, 31

U.S. Const. art. I, § 10, cl. 3 .....*passim*

STATUTES

Alaska Stat. § 29.45.070 25

Alaska Stat. § 43.56.210 .....3, 24

Ind. Code § 6-1.1-1-11 25

Neb. Rev. Stat. § 77-1245.....37

Valdez Municipal Code § 3.12.010.....3

Valdez Municipal Code § 3.12.020.....3, 4, 21

Valdez Municipal Code § 3.12.022.....3, 11, 25

Valdez Municipal Code § 3.12.060.....25

Valdez Municipal Code § 3.28.010.....3, 11, 24

Wis. Stat. § 76.07.....37

OTHER AUTHORITIES

W.H. Burroughs, *A Treatise on the Law of Taxation* (1877) 19, 27

Thomas M. Cooley, *A Treatise on the Constitutional Limitations* (7th ed. 1908).....19

Samuel Freeman Miller, *Lectures on the Constitution of the United States* (1891).....19

State of Alaska, Alaska Taxable 2000: Municipal Taxation-Rates and Policies 4, 5, 24

Joseph Story, *Commentaries on the Constitution of the United States* (5th ed. 1891).....19

BRIEF FOR RESPONDENT

Respondent City of Valdez respectfully submits that the judgment of the Supreme Court of Alaska should be affirmed.

STATEMENT

During the tax years at issue, petitioner's oil tankers each spent an average of 45 days per year in port in the City of Valdez, Alaska, where they loaded millions of barrels of valuable crude oil for transport to West Coast refineries. Pet. App. 9a. While in the City, petitioner's vessels and their crews enjoyed the same extensive municipal services that the City provided to its residents, as well as a number of services that the City furnished exclusively to ocean-going vessels, which continued to derive benefit from many of those services when at sea. To pay for these services, the City levied an *ad valorem* property tax on numerous types of both personal and real property, including petitioner's vessels.

Petitioner does not challenge the City's authority to tax its vessels on an *ad valorem* basis; rather, it takes issue with the manner in which the City imposed its tax. Petitioner argues that the City's property tax violated the Tonnage Clause—a seldom-invoked constitutional provision that prohibits States from laying "any duty of tonnage" (U.S. Const. art. I, § 10, cl. 3)—because it purportedly fell "*only* on certain large vessels." Pet. Br. 3 (emphasis in original). And petitioner argues that the tax violated the Due Process Clause of the Fourteenth Amendment and the dormant aspect of the Commerce Clause because the tax supposedly enabled the City to tax time that a vessel spends on the high seas and thereby

created a risk of duplicative taxation. Both of petitioner's constitutional challenges fail.

Petitioner is asking this Court to hold, for the first time since the Founding, that an *ad valorem* property tax can violate the Tonnage Clause. But, as this Court has held on numerous occasions and the Alaska Supreme Court recognized below, the Tonnage Clause simply does not apply to property taxes. Moreover, even if the Court broke with this settled line of authority to hold that the Tonnage Clause bars "discriminatory" property taxes, the City's tax, which applied to many types of property other than vessels, could not accurately be termed "discriminatory."

Petitioner's challenge to the City's apportionment formula under the Due Process Clause and Commerce Clause is equally unavailing. The City's "port-day" formula fairly apportioned each vessel's value according to the location of its productive commercial activities; time spent on the high seas is irrelevant to that method of apportioning value. But even if petitioner were correct that the value of its vessels can only be apportioned according to their physical presence, it is wrong to claim that a vessel's domicile State possesses the exclusive authority to tax the share of value proportionate to the time the vessel spends on the high seas. Petitioner's attempt to afford "super" taxing status to a vessel's domicile State would resurrect a modified version of the "home port" doctrine, which, until discarded by courts in favor of the rule of apportionment, reserved to a vessel's domicile the exclusive right to tax the vessel. Petitioner offers no plausible basis for reviving this now-defunct and discredited doctrine.

The Alaska Supreme Court's judgment should be affirmed.

1. The City of Valdez is a municipality of approximately 4,500 residents situated on the north end of Prince William Sound, Alaska. Port Valdez is within the City's limits, as is the southern terminus of the Trans Alaska Pipeline System ("TAPS"). The pipeline carries oil extracted from Alaska's North Slope to Port Valdez, where it is loaded onto oil tankers for transport to refineries in other States.

During the tax years in question, the City—like countless other municipalities—assessed an *ad valorem* property tax on a number of different types of property within its jurisdiction. The City applied the same mill rate—twenty mills, or two percent—to all property that it taxed, including mobile homes, trailers, recreational vehicles, and certain property used in oil and gas exploration, production, and pipeline transportation. *See* Valdez Municipal Code §§ 3.12.010-.022, 3.28.010; Pet. App. 45a-47a. As part of its *ad valorem* tax on oil and gas property, the City taxed a wide variety of property classified as "tangible personal property," including motor vehicles, machinery, appliances, supplies, maintenance equipment, and other non-exempted personal property used in oil and gas exploration, production, and pipeline transportation. Alaska Stat. § 43.56.210; Valdez Municipal Code § 3.28.010.

For more than two decades, the City excluded oil tankers and other large vessels from its property tax. In 1999, however, the City extended its property tax to cover vessels that are more than ninety-five feet in

length.[1] The 1999 ordinance instructed the City Assessor to "allocate to the city the portion of the total market value of [each covered vessel] that fairly reflects its use in the city." Valdez Municipal Code § 3.12.020(B)(1). In a subsequent resolution, the City approved the City Assessor's default taxation formula, which apportioned value according to a ratio designed to ascertain the proportion of a vessel's productive commercial activities that took place in Valdez—the number of days spent in Port Valdez divided by the number of days in all ports. Pet. App. 55a. The resolution further provided that a taxpayer could petition the City for a different apportionment formula if it believed that the apportionment method did "not reasonably represent the portion of the total value of the vessel that should be" attributed to the City. *Id.* at 56a.

The 1999 ordinance applied to both intrastate and interstate vessels, but permitted the City to tax only those vessels that had a tax situs within the City. Valdez Municipal Code § 3.12.020(C). Consistent with these criteria, the City applied its *ad valorem* tax to a variety of vessels, including oil tankers, barges, tugboats, and a local tour vessel, some of which operated only in Alaska's waters. Alaska S. Ct. Excerpts of Record ("E.R.") 273-74, 317, 565-72. In 2000, the year the City's tax ordinance took effect, non-oil-shipping vessels constituted approximately a third of the vessels subject to the City's tax. *Id*. That year, the City collected $17,588,214 in property taxes from all sources. State

[1] The tax exempted vessels used "primarily in some aspect of commercial fishing" and vessels that dock at the Valdez Container Terminal. (The latter were subject to a separate municipal dockage charge.) Valdez Municipal Code § 3.12.020(A)(1).

of Alaska, Alaska Taxable 2000: Municipal Taxation—Rates and Policies 16 (2001), *at* http://www.commerce.alaska.gov/dcra/osa/pub/00Taxable.pdf. The assessed value of taxable real and personal property used in activities associated with oil and gas exploration, production, and pipeline transportation constituted approximately 68% of the City's tax base (*id.* at 35), and the City's local levy on real property not associated with oil and gas activities accounted for 22%. *Id.* In contrast, the City's personal property tax on vessels accounted for less than 11% of the City's tax base. *Id.*

The City used the property tax revenue to pay for the municipal services that it provided, including the community hospital, sewage systems, utilities, roads, the municipal airport, law enforcement services, and emergency response systems. Pet. App. 54a. In addition, the City maintained a school district, community college, animal control department, library, local parks, and recreation facilities, and supported various community service organizations. Def.'s Alaska S. Ct. Br. App. A.

2. Valdez residents were not the only beneficiaries of these municipal services. The hundreds of vessels that called at Port Valdez each year, as well as their crew members, also benefited from the City's services.

Because both Port Valdez and the TAPS terminus are located within the City's borders, the City had particularly extensive contacts with oil tankers and their crews. Indeed, through subsidiary shipping companies, the five oil companies that operate TAPS—Exxon Mobil, British Petroleum, ConocoPhillips, Koch Industries, and Chevron—operated dedicated fleets of oil tankers that loaded hundreds of

millions of barrels of crude oil each year at Port Valdez and then transported the oil to refineries in Hawaii, on the West Coast, and (rarely) in foreign countries.

The oil shippers' extensive physical presence and commercial activities in the City had significant economic and environmental repercussions. The regular presence of oil tankers placed, on average, an additional 550 people within the City each year, a more than ten-percent increase in the City's total population. E.R. 273, 438. While in the City, the tankers' transient crews utilized many of the same benefits and services that the City provided to its permanent residents. *Id.* at 441, 477. And, each of the shippers had at least one employee who permanently resided in the City. E.R. 215.

The City also provided services that were specifically necessitated by the oil tankers' continuous presence within its port. For example, the City provided alternative docking facilities that tankers used when being repaired or when the TAPS terminal was unavailable. J.A. 74. The City also helped to maintain an orderly flow of marine traffic in and out of the harbor by providing public notice to non-tankers to stay clear of the security zone around the Alyeska Marine Terminal. *Id.*

The oil shippers' activities in and around the City also presented significant environmental challenges, the gravest of which was the possibility of oil spills. In an effort to reduce the potential impact of such spills, the City permitted oil shippers to utilize its Civic Center for emergencies and coordinated with the shippers to conduct periodic "oil spill drills" at the center. These drills diverted the center's law enforcement and management personnel away from

their regular job duties. E.R. 322-23. The City also made its police, firefighters, emergency response teams, and medical resources available to the oil companies. J.A. 76.

Many aspects of the City's environmental response program were developed in the aftermath of the 1989 *Exxon Valdez* oil spill, which occurred well outside of Valdez but nevertheless had profound environmental and economic consequences for the City. After the oil tanker ran aground on a reef twenty miles outside the City in Prince William Sound, spilling eleven million gallons of crude oil, thousands of workers inhabited the City during the ensuing three-year cleanup of the surrounding shoreline. These workers—some of whom lived on a vessel docked at a City-owned facility—consumed numerous municipal resources, and their presence stressed landfill and sewage ponds beyond then-existing capacities. City officials held staff meetings twice daily to coordinate with the cleanup workers, and a number of City employees were reassigned from their regular jobs to aid in the cleanup efforts. E.R. 323-25.

The City also has developed extensive security measures to safeguard TAPS, its port, and the vessels that dock there. After the September 11, 2001, terrorist attacks, the City collaborated with the Coast Guard to install an infrared surveillance system that enables the City to monitor activities in the port. J.A. 75. The City was also responsible for alerting the public to the expanded "security zones" established by the Coast Guard in Prince William Sound, which protect the oil tankers from potential terrorist attacks. *Id*. And, in December 2003, pursuant to a national "Code Orange" alert, Port Valdez was closed to all vessel traffic, and the City's law enforcement personnel were responsible for guarding

access to the port on rotating twelve-hour shifts. J.A. 75-76.

3. Petitioner is the oil shipping company that ConocoPhillips owns for purposes of transporting TAPS oil to ports in Hawaii, Washington, and California. Petitioner's principal place of business during the tax years in question was California; it has since relocated its principal place of business to Texas. Pet. for Cert. 4. During those tax years, petitioner's vessels each spent an average of 45 days per year docked in the City, where they loaded all of the oil that they transported to refinery facilities. E.R. 475-76.

Petitioner sued the City in Alaska state court, challenging the constitutionality of its property tax for the tax years 2000 to 2004, which amounted to between $400,000 and $1.7 million annually. Petitioner argued, among other things, that the property tax was an unconstitutional duty of tonnage, and that the tax violated the Commerce Clause and Due Process Clause because the City's apportionment formula purportedly "apportion[ed] values to Valdez that are not associated with a vessel's presence in Valdez." E.R. 7.

The trial court initially held that the City's tax violated the Tonnage Clause on the factually incorrect basis that "large vessels, and only large vessels, are the only personal property taxed by the City." Pet. App. 43a. After the City moved for reconsideration, the court vacated its ruling and, after further briefing, held that the City's apportionment method violated the Commerce and Due Process Clauses because it created a "risk of multiple taxation." *Id.* at 34a. At the time, the trial court declined to pass on the Tonnage Clause issue, but because the City's ap-

portionment formula is severable from its tax ordinance, the City later renewed its motion for summary judgment on the Tonnage Clause issue, and the trial court rejected petitioner's Tonnage Clause challenge. *Id.* at 30a.

On appeal, the Alaska Supreme Court upheld the City's property tax in its entirety. Emphasizing that petitioner had conceded that its vessels possessed a taxable situs in the City, the court held that the City's tax satisfied the Due Process Clause and Commerce Clause because it was "fairly apportioned" among all tax situses and permitted the City to tax only its fair share of the value of petitioner's vessels. Pet. App. 8a-9a, 10a-15a. With respect to the Tonnage Clause, the Alaska Supreme Court explained that a fairly apportioned property tax is not a duty of tonnage. *Id.* at 18a. Because petitioner's vessels were "taxed based on their value," consistent with a traditional property tax, the court held that the City's tax did not constitute an impermissible tonnage duty. *Id.*

SUMMARY OF ARGUMENT

The City's *ad valorem* levy upon petitioner's vessels did not violate the Tonnage Clause. Nor did the formula used by the City to apportion the vessels' taxable values violate the Due Process Clause or the dormant aspect of the Commerce Clause.

I. The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art I, § 10, cl. 3. Valdez's property tax did not violate that proscription for the simplest of reasons: Its *ad valorem* tax on property was not a "Duty of Tonnage."

A. Since the Founding, this Court has invalidated on Tonnage Clause grounds only two types of

impositions: actual tonnage duties—*i.e.*, taxes levied in proportion to the cubic capacity of the vessel (*see*, *e.g.*, *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 212 (1871))—and, far less frequently, flat fees charged to vessels arriving in port whether or not the vessel avails itself of any service or benefit the port provides. *See S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867). Because this latter category of fees was imposed for nothing more than the "privilege of entering, trading in, or lying in a port" (*Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935)), it was considered to be a tax on vessels as "instruments of commerce and navigation" (*Transp. Co. v. Wheeling*, 99 U.S. 273, 277 (1878)) and thus contrary to the "spirit and purpose" of the Tonnage Clause. *Packet Co. v. Keokuk*, 95 U.S. 80, 87 (1877).

In 220 years, however, this Court has never held an *ad valorem* property tax to be an unconstitutional duty of tonnage. Quite the contrary, the Court has considered it "too well settled to admit of question" that "taxes levied by a State, upon ships or vessels . . . as property, based on a valuation of the same as property," are not "[t]onnage duties." *Wheeling*, 99 U.S. at 279, 283. The fundamental distinction between *ad valorem* taxes on vessels and tonnage duties, the Court recognized (*see id.*), is that the former are based on the property's continuous relationship with the taxing jurisdiction and, accordingly, cannot be viewed as charges simply for the "privilege of entering, trading in, or lying in port." *Clyde Mallory*, 296 U.S. at 266.

B. Petitioner seems to acknowledge this much, conceding—as it must, in light of *Wheeling*—that "a State need not exclude vessels from a generally applicable *ad valorem* property tax." Pet. Br. 17. It contends, though, that the Tonnage Clause does not

tolerate "property taxes that fall *only* on vessels," and argues that Valdez's tax "effectively single[d] out ocean-going tankers." *Id.* at 10, 17 (emphasis added).

Petitioner's characterization of Valdez's tax is false. Valdez assessed its *ad valorem* tax at a single rate on a diverse variety of property—not just oil tankers, and not even just large vessels, but also mobile homes, trailers, recreational vehicles, and various types of personal property defined under state law as oil and gas property, including motor vehicles, machinery, appliances, supplies, and maintenance equipment. Valdez Municipal Code §§ 3.12.022, 3.28.010. Indeed, vessels accounted for only *eleven percent* of the City's tax base in 2000. The notion peddled by petitioner that Valdez "single[d] out ocean-going tankers" for taxation is a canard. The *truth* is that Valdez taxed other types of personal property on the same basis as petitioner's oil tankers. That makes the City's property tax indistinguishable from the *ad valorem* tax on steamboats and other personal property that this Court upheld against a Tonnage Clause challenge in *Wheeling*.

But even if Valdez had repealed all of its other property taxes and taxed on only oil tankers resident in the City, that still would not convert the City's *ad valorem* property tax into a duty of tonnage. On the broadest reading of the Tonnage Clause, it prohibits only those taxes or fees "upon the ship as an instrument of commerce." *Wheeling*, 99 U.S. at 284. As *Wheeling* explains, "the State may tax the owners of such personal property for their interest in the same." *Id.* at 283-84. That a property tax falls only on vessels does not make it any less a property tax; its predicate is the property's habitual relationship with the taxing jurisdiction, not merely the entry

into the jurisdiction's ports. If petitioner's complaint is that the City's tax discriminated against large vessels, its remedy (if any) lies in the Equal Protection Clause or, more likely, the political process—but not, in any event, the Tonnage Clause.

II. Petitioner's due process and dormant Commerce Clause challenges to the City's apportionment formula also fail. Petitioner itself acknowledges that a locality "may impose a property tax upon its fair share of an interstate transportation enterprise." Pet. Br. 31 (quoting *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 324 (1968)). The City did nothing more.

A. Petitioner's due process argument that the City taxes "extraterritorial values" proceeds from the premise that the *only* permissible metric for apportioning the value of movable property is "the taxable object's actual proportionate presence within the taxing jurisdiction." Pet. Br. 33. "[T]he Constitution," petitioner contends, "does not tolerate the use of an apportionment formula" that is not based on "the actual location of a taxpayer's property." *Id.* at 37. But neither the Due Process Clause nor this Court's jurisprudence imposes such a methodological straightjacket on localities. Cities and states across the Nation utilize myriad formulas for apportioning the value of property, and this Court has made clear that so long as localities' tax levies—however calculated—are not "out of all proportion to the business transacted . . . in th[e] State" (*Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931)), they satisfy the requirements of due process.

Judged from this perspective, the City's apportionment formula clearly passes constitutional muster. Valdez measured the portion of the vessel's total

commercial activity conducted in Valdez by dividing the number of productive days the vessel spends in port in Valdez by the number of days it spends in all ports, and apportioned the vessel's value to Valdez in accordance with that ratio. This Court has previously approved a similar "port-day" formula for allocating value (*Luckenbach S.S. Co. v. Franchise Tax Bd.*, 219 Cal. App. 2d 710 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964)), and it should reaffirm that position here. By looking to the vessel's productive commercial activity, Valdez's measure reasonably apportioned the value of movables according to the economic value that they generate in various locations. That plainly is a reasonable method of assessing in-state value, which is all that due process requires.

Even if petitioner were correct that the only constitutional method of apportioning movable property is in accordance with its physical presence in the tax situs—and it is not—the City's apportionment formula still would comport with due process. Petitioner's argument that taxation of property temporarily absent from any tax situs amounts to taxation of "extraterritorial values" rests on the assumption that the absent property has some apportionable value independent of the value originated in the property's various tax situses. But this Court necessarily rejected that notion in each of several cases holding that a domicile tax situs may tax the full value of property that spends much of the year absent from it but acquires no other tax situs. *See*, *e.g.*, *New York ex rel. N.Y. Cent. & Hudson River R.R. Co. v. Miller*, 202 U.S. 584, 597 (1906). Otherwise, the domicile itself would be taxing the "extraterritorial values."

Petitioner's answer—that a domicile has "unique justification" for taxing temporarily absent "extraterritorial values" that other tax situses do not (Pet. Br. 33)—has no foundation in *due process*. Indeed, if it were correct, the constitutionality of an apportionment formula could turn on where a taxpayer chose to domicile itself. That is a very peculiar *constitutional* rule, and this Court should reject it.

B. Nor did the City's apportionment formula pose any "prospect of duplicative taxation" (Pet. Br. 27) that might implicate the dormant aspect of the Commerce Clause.

Petitioner's imagined risk of duplicative taxation hinges entirely on its assertion that *only* a taxpayer's domicile—and no other tax situs—may levy upon the property's time spent outside of any tax situs. Nothing in the Commerce Clause (dormant or actual) or the cases interpreting it remotely suggests that domiciles enjoy the "super" taxing authority that petitioner suggests.

Petitioner relies heavily on this Court's decision in *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607 (1962), but that reliance is badly misplaced. *Central Railroad* did not hold (or even imply) that a domicile jurisdiction may tax "no-tax-situs" time to the exclusion of all other tax situses. To the contrary, *Central Railroad* rejected the argument that a domicile State had an apportionment claim superior to other established tax situses. *Id.* at 613. Its reasoning can be reconciled only with the sensible proposition that when apportioning value, the same rules apply to domiciles and other tax situses alike.

In fact, petitioner is simply attempting to resuscitate a modified version of the discredited "home port" doctrine, which long ago "yielded to the rule of

fair apportionment." *Japan Line, Ltd. v. L.A. County*, 441 U.S. 434, 442 (1979). Petitioner's strategic rationale for the effort is exposed by its recent change of domicile from California to Texas. On petitioner's super-domicile theory, going forward, one-half or more of the value of each of its ships—the fraction corresponding to the portion of the tax year that each ship is located in no identifiable tax situs—would be taxable only by its domicile. But because petitioner's ships never visit Texas, Texas likely is powerless to tax even the ships' "no-tax-situs" time. *See Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 201 (1905). If the goal of apportionment is (as this Court has noted) to "slic[e] a taxable pie among several [localities] in which the taxpayer's activities contributed to taxable value," it is an odd interpretation of the dormant Commerce Clause that compels localities to allocate the greatest "slic[e]" to the locality that provided the smallest (and perhaps no) "contribution to taxable value." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 186 (1995).

ARGUMENT

I. VALDEZ'S PROPERTY TAX DID NOT VIOLATE THE TONNAGE CLAUSE.

Petitioner invites this Court to hold, for the first time since the Founding, that an *ad valorem* property tax violates the Tonnage Clause. The Alaska Supreme Court correctly held that the Tonnage Clause does not apply to *ad valorem* taxes like the City's tax at issue here. Pet. App. 20a. But even if this Court were willing to announce an unprecedented expansion of the Clause to bar any "discriminatory" *ad valorem* tax, the City's tax—which ap-

plied to numerous types of property, not just vessels—was not remotely discriminatory.

A. The Tonnage Clause Does Not Apply To Property Taxes On Vessels.

1. The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art. I, § 10, cl. 3. As petitioner concedes (at 15), the "literal scope" of the Clause is quite narrow: Crafted by the Framers to be a loophole-closing complement to the Import-Export Clause's ban on state levies on imported or exported goods (*S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867)), the Tonnage Clause prohibits only certain duties measured in proportion to a vessel's "internal cubic capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 212 (1871); *see also Portwardens*, 73 U.S. (6 Wall.) at 34-35 (the "words [of the Tonnage Clause] describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton"). By its terms, the Tonnage Clause does not apply to *ad valorem* property taxes.[2]

This Court has occasionally invoked the "spirit and purpose" of the Tonnage Clause (*Packet Co. v. Keokuk*, 95 U.S. 80, 87 (1877)) to suggest that certain fees not measured in tons might also violate the Clause when levied upon vessels as "instruments of

---

[2] Indeed, not even every duty measured by a vessel's tonnage is an impermissible duty of tonnage. *See*, *e.g.*, *Huse v. Glover*, 119 U.S. 543, 549 (1886) (upholding a tonnage-based toll for using state-constructed locks because "[t]his is simply a mode of fixing the rate according to the size of the vessel and the amount of property it carries" through the locks).

commerce and navigation." *Transp. Co. v. Wheeling*, 99 U.S. 273, 277 (1878). But this Court's extension of the Tonnage Clause beyond its literal terms has not occasioned a sweeping repudiation of taxes and fees levied on vessels. To the contrary, the *only* cases in which the Court has struck down a state tax as a violation of the Tonnage Clause—the last of which was decided in 1877—involved either a literal duty of tonnage (*see*, *e.g.*, *Inman S.S. Co. v. Tinker*, 94 U.S. 238, 241 (1877) (tonnage duty of "one and one half of one cent per ton")), or a flat per-vessel fee that was completely untethered to the provision of any service, safety, or security for the vessel and thus amounted to a tax on the use of public waterways. *See Port-wardens*, 73 U.S. (6 Wall.) at 34-35; *see also Huse v. Glover*, 119 U.S. 543, 549-50 (1886) (defining a "duty of tonnage" as "a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country"); *Morgan's S.S. Co. v. La. Bd. of Health*, 118 U.S. 455, 463 (1886).

2. At the same time, this Court has consistently recognized—as "too well settled to admit of question"—that "taxes levied by a State, upon ships or vessels . . . as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution." *Wheeling*, 99 U.S. at 279; *see also State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213 ("Taxes levied by a State upon ships and vessels . . . *as property*, *based on a valuation of the same* as property, are not within the prohibition of the Constitution . . . .") (emphasis in original). Indeed, "[a]nnual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question." *Id.* at 214.

The inapplicability of the Tonnage Clause to property taxes has been one of the most consistent themes in this Court's Tonnage Clause jurisprudence. *Wheeling* alone invoked the distinction between tonnage duties and property taxes no fewer than ten times. *See* 99 U.S. at 279-85. It emphasized, for example, that "[t]onnage duties on ships by the States are expressly prohibited, but taxes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition." *Id.* at 283; *see also id.* at 285 ("[T]he enrolment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property.").[3] And other cases have invalidated tonnage duties only after emphasizing that they "applied wholly irrespective of the *ad valorem* principle" (*Inman*, 94 U.S. at 243), or were "levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 217; *see also*, *e.g.*, *The Passenger Cases*, 48 U.S. (7 How.) 283, 402 (1849) (a State "may tax a ship or other ves-

---

[3] *See also*, *e.g.*, *Wheeling*, 99 U.S. at 279 ("[T]here are many cases in which the courts . . . have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property."); *id.* at 282 ("[O]wners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property."); *id.* at 284 ("Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce, but they all admit, expressly or impliedly, that the State may tax the owners of such personal property for their interest in the same.").

sel used in commerce the same as other property owned by its citizens").

The leading early commentators on the Constitution similarly recognized that the Tonnage Clause does not apply to *ad valorem* taxes. Justice Story's *Commentaries* categorically state that "[t]axes levied upon vessels owned by the citizens of the State as property, based on their value as property, as *e.g.* on their tonnage, are not within the constitutional provision." Joseph Story, *Commentaries on the Constitution of the United States* § 1016, at 738 n.(a) (5th ed. 1891). Similarly, in his *Lectures on the Constitution*, Justice Miller explained that a vessel "is liable to be taxed like any other property that [the owner] may possess." Samuel Freeman Miller, *Lectures on the Constitution of the United States* 254 (1891). Thomas Cooley's *Constitutional Limitations* and William Burroughs's seminal tax treatise adopt the same view. *See* Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 689-91 (7th ed. 1908) ("The meaning of [the Tonnage Clause] seems to be that vessels must not be taxed as vehicles of commerce, according to capacity; but it is admitted they may be taxed like other property.") (footnote omitted); W.H. Burroughs, *A Treatise on the Law of Taxation* 91 (1877) (J.A. 83-84) ("The prohibition only comes into play where they are not taxed in the same manner as other property of citizens of the State, but where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel.").

3. As these cases and commentaries make clear, the crucial distinction between a (constitutional) property tax and an (unconstitutional) tonnage duty is that the former is assessed based on the value of the vessel. Thus, a tax is an impermissible tonnage

duty where, "[i]f either of the . . . vessels . . . was new and making her first voyage, and another of the same tonnage was making her last trip before being broken up, and the former were of many times the value of the latter, the act would apply the same procrustean rule to both." *Inman*, 94 U.S. at 243; *see also State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 224 (invalidating a tonnage duty because it "depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs").

This distinction accords even with the "spirit and purpose" sometimes ascribed to the Tonnage Clause. Taxes based on vessel value do not constitute charges on vessels as "instruments of commerce" (*Wheeling*, 99 U.S. at 277), or for the "privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 266 (1935). Indeed, unlike a tonnage duty—which applies indiscriminately to vessels without regard to their connection to the taxing jurisdiction (*see Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577, 580 (1874) (striking down a tonnage duty that was "due from all vessels arriving and stopping in a port"))—a property tax presupposes not only that the vessel has entered the port, but also that the vessel has developed a sufficient relationship with the taxing jurisdiction to justify the assessment of a tax on the vessel's value. *Cf. Inman*, 94 U.S. at 243 (striking down a tonnage duty that applied if "the vessel enter[ed] the port and immediately t[ook] her departure").

Thus, while tonnage duties "ten[d] immediately to interfere with and to obstruct the commerce between the States," a property tax upon a vessel that

has acquired a tax situs in the jurisdiction where it is docked is no different from a "tax . . . laid upon lumber or cotton lying on the dock." *Morgan v. Parham*, 83 U.S. (16 Wall.) 471, 475 (1872). Because such a tax can be imposed only on property that has acquired a tax situs in the jurisdiction, the assessment of property taxes on vessels does not threaten to erect the "local hindrances to trade and carriage by vessels" that the Tonnage Clause is designed to avoid. *Keokuk*, 95 U.S. at 85.

4. As the Alaska Supreme Court correctly recognized, the City's property tax was—in both label and function—a tax "based on th[e] value" of the property. Pet. App. 18a. By its terms, the tax did not apply indiscriminately to all vessels—or even to all oil tankers—that entered Port Valdez. Instead, the tax applied only to those vessels that acquired a tax situs within the City. Valdez Municipal Code § 3.12.020; Pet. App. 46a. Petitioner concedes that its vessels acquired a tax situs in Valdez by virtue of their substantial and habitual presence in the City. Pl.'s Alaska S. Ct. Br. 21-22; Pet. App. 8a-9a. That is the end of the matter under the Tonnage Clause because the City's tax was levied on petitioner's vessels "as property, based on a valuation of the same as property" (*State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213 (emphasis omitted)), not for the privilege of entering, trading in, or lying in Port Valdez.

Petitioner nevertheless insists that the tax was a tonnage duty because the City used its property tax as a general revenue measure. Pet. Br. 23-24. But petitioner does not explain why the use of property tax funds for general revenue purposes would transform a valid tax on vessels "as property" into an unconstitutional duty of tonnage. Indeed, the very point of a property tax is to raise revenue so that the

taxing government can provide services to its residents and visitors, including hospitals, schools, and the other "advantages of a civilized society." *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 228 (1980) (internal quotation marks omitted). Petitioner's contention that the City used its tax revenues for an impermissible general revenue purpose is baffling. It is also flatly inconsistent with this Court's decision in *Wheeling*, which *upheld* a municipal property tax levied on steamboats as a general revenue measure for "the use of the city." 99 U.S. at 277.[4]

Petitioner's "impermissible purpose" test also would give rise to insuperable administrative difficulties. Petitioner apparently envisions that, when confronted with a Tonnage Clause challenge, courts will scour the books and records of the taxing jurisdiction to determine whether the fungible funds raised were dedicated to vessel-specific services or were instead used as part of the jurisdiction's general revenue. But courts are manifestly ill-equipped to perform such technical and time-consuming accountings of municipal coffers, and this Court has held repeatedly that taxpayers may not predicate their constitutional challenges to taxes solely on the manner in which a State chooses to expend the re-

---

[4] Petitioner thinks it "notable that an early Congress that contained many of the Framers of the Constitution believed that a tax for the purpose of funding a hospital *was* subject to the Tonnage Clause." Pet. Br. 24 (emphasis in original). But even a cursory review of the acts reveals that South Carolina sought (and was granted authority by Congress) to impose a *literal* duty of tonnage—not to exceed "six cents, per ton"—on *all* vessels entering Charleston harbor. Pet. Br. Addendum 3a.

sulting revenues. *See*, *e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006).

In any event, no such burdensome inquiry is required to resolve this case. Petitioner's concession that its vessels acquired a tax situs within the City conclusively establishes that the City's property tax was not a duty of tonnage. The Court's Tonnage Clause inquiry can—and should—end there.

B. Petitioner's Attempt To Engraft A "Nondiscrimination" Rule Onto The Tonnage Clause Could Not Impugn The City's Tax And Fails As A Matter Of Law.

Despite two centuries of settled case law that States and municipalities may impose property taxes on vessels, petitioner argues that the City's tax violated the Tonnage Clause because "large vessels, and only large vessels, [were] the only personal property taxed by the City." Pet. Br. 22 (citing Pet. App. 43a). That is wrong as a factual matter. Valdez imposed its *ad valorem* tax on many other types of property within its jurisdiction—some of which are expressly denominated as "personal property" by Alaska statute—using the same mill rate that the City applied to vessels. But even if Valdez had singled out vessels for *ad valorem* taxation, the tax would not have violated the Tonnage Clause. There is nothing in the text of the Clause or this Court's precedent that supports the novel view that a municipality must tax some indeterminate amount of non-vessel property before it can impose a property tax on vessels.

1. Valdez's Property Tax Did Not Single Out Vessels For Taxation.

Contrary to petitioner's oft-repeated contention, Valdez did not single out vessels for property taxa-

tion. The City's property tax applied to numerous other kinds of property within its jurisdiction, including personal property. Petitioner never discusses these other types of property, but this omission cannot change the incontrovertible historical facts.

Pursuant to Section 3.28.010 of the Valdez Municipal Code, the City imposed its *ad valorem* tax on all property that is taxable under Alaska Statutes Chapter 43.56. *See* Valdez Municipal Code § 3.28.010 (levying "a tax on all taxable property taxable under Alaska Statutes Chapter 43.56 at the rate of taxation that applies to other property taxed by the city"). Chapter 43.56, in turn, encompassed a host of oil and gas properties that are expressly denominated as "real and *tangible personal property*," including motor vehicles, machinery, appliances, supplies, maintenance equipment, and other non-exempted personal property used in oil and gas exploration, production, and pipeline transportation. Alaska Stat. § 43.56.210 (emphasis added). Thus, the City taxed a wide variety of "personal property" other than vessels. In fact, vessels accounted in 2000 for less than eleven percent of the City's tax base. State of Alaska, Alaska Taxable 2000: Municipal Taxation—Rates and Policies 35 (2001), *at* http://www.commerce.alaska.gov/dcra/osa/pub/00Taxable.pdf. Because petitioner's Tonnage Clause challenge hinges on its belief that vessels were the *only* type of "personal property" taxed by the City, that argument fails on its own terms.

The remainder of Valdez's property tax scheme confirms that the City did not single out vessels for special tax treatment. In addition to taxing vessels and various oil and gas properties, the City also taxed certain mobile homes, trailers, and recreational vehicles on an *ad valorem* basis. Valdez Mu-

nicipal Code § 3.12.022. It imposed precisely the same mill rate—twenty mills, or two percent—on all of these different types of property. *Id.* § 3.12.060.

To be sure, Valdez classified mobile homes and trailers as "real property," but this classification carries no constitutional significance. As petitioner acknowledges (at 26 n.13), the Court must "loo[k] past 'the formal language of the tax statute [to] its practical effect.'" *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) (first alteration added); *see also*, *e.g.*, *Inman*, 94 U.S. at 244 (under the Tonnage Clause, "the name [of the tax] is immaterial; it is the substance we are to consider"). Other States classify precisely the same property as "personal property" (*see*, *e.g.*, Ind. Code § 6-1.1-1-11 (defining "personal property" to include "mobile houses")), and indeed Valdez itself could have done so with a flick of the legislative pen. *See* Alaska Stat. § 29.45.070 (providing that "[m]obile homes, trailers, house trailers, trailer coaches, and similar property" are generally "classified as real property for tax purposes unless expressly classified as personal property by ordinance"). Thus, the practical effect of the City's property tax ordinances was to tax various kinds of similar property at the same mill rate. The tax would therefore survive constitutional scrutiny even if petitioner were correct that the Tonnage Clause includes a nondiscrimination principle.

2. The Tonnage Clause Does Not Prohibit States From Levying *Ad Valorem* Taxes Only On Vessels.

Valdez chose to tax a number of types of personal property, and other similar property, in addition to vessels. But even if it had not done so, the City's

property tax on vessels still would not have violated the Tonnage Clause. Petitioner resists this conclusion by contending that the Tonnage Clause contains a so-called "anti-discrimination" principle that prohibits States and municipalities from imposing *ad valorem* taxes only on vessels. Pet. Br. 12-22. Petitioner is wrong for at least four reasons.

a. The "anti-discrimination" principle that petitioner proposes has no basis in either the text or purpose of the Tonnage Clause. The language of the Clause does not create any nondiscrimination rule; as explained above, it prohibits only certain duties on vessels that are measured in terms of "tonnage," *i.e.*, the internal cubic capacity of a vessel. Nor does the purpose of the Clause supply such a rule: Even under the broadest conception of its purpose, the Tonnage Clause would reach only taxes or fees that operate as a charge on "the privilege of entering, trading in, or lying in a port." *Clyde Mallory*, 296 U.S. at 265-66. Because an *ad valorem* property tax is not—and cannot be—a charge on port access, it is not a tonnage duty regardless of which property is subject to the tax. *See supra* pp. 19-21.

b. The quotations that petitioner culls from this Court's decision in *Transportation Co. v. Wheeling*, 99 U.S. at 273, do not support the existence of a subtextual nondiscrimination principle lurking within the Tonnage Clause. Petitioner seizes (at 17) on *Wheeling*'s acknowledgment that States may tax vessels "in the same manner as other personal property" (99 U.S. at 284), but *Wheeling* does not hold, as petitioner implies, that a municipality must tax other kinds of property in order for a property tax on vessels to satisfy the Tonnage Clause. *Wheeling*'s reference to the "same manner" (and similar language allowing taxation of vessels "like other property," Pet.

Br. 18 n.7) simply refers to taxation *based on property value*—that is, *ad valorem* taxation. *Wheeling* establishes that taxes levied on vessels "as property, based on a valuation of the same as property, . . . are not within the prohibition of the Constitution." 99 U.S. at 279; *see also supra* pp. 17-19 (discussing other cases that reach the same conclusion).

That *Wheeling* did not create (*sub silentio*) a new nondiscrimination rule is confirmed by the Burroughs treatise from which the Court drew the "same manner" language. Burroughs, like the Court, described a sharp distinction between tonnage duties and property taxes, explaining that the Tonnage Clause "only comes into play where [vessels] are not taxed in the same manner as other property of citizens of the State, *but* where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel." Burroughs, *supra*, at 91 (J.A. 83-84) (emphasis added). By contrasting taxes "in the same manner as other property" with tonnage duties imposed "without reference to the value of the vessel," Burroughs made clear that the "same manner" referred to *ad valorem* taxation.

In paraphrasing the treatise, *Wheeling* inadvertently substituted an "or" for the italicized "but." *See Wheeling*, 99 U.S. at 284. This does not, however, obscure the passage's meaning: A State or municipality may tax the value of vessels just as it may tax the value of *any* property, but the taxation of *other* property is not a prerequisite for imposing a property tax on vessels. Even if the City's property tax had fallen only on vessels—and, as demonstrated above, that is not remotely the case—the tax would nonetheless remain an assessment based on the value of property that has acquired a tax situs within Valdez, not a charge for the privilege of accessing the port.

c. Petitioner's attempt to engraft a nondiscrimination principle onto the Tonnage Clause also is irreconcilable with this Court's decision in *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882). In *Parkersburg*, this Court rejected a Tonnage Clause challenge to an "exorbitant" wharfage fee—a fee assumed both to bear no relation to the actual cost or value of the wharfage and to impose a "burden on commerce." *Id.* at 696. While "[e]xorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage," the Court emphasized that such a fee is still "exorbitant wharfage, and not a duty of tonnage; and the remedy for one is different from the remedy for the other." *Id.* Similarly, here, if it is a "discriminatory" tax of which petitioner complains, it is a discriminatory tax and not a duty of tonnage, and the remedy (if any) lies in some other provision of the Constitution—perhaps the Equal Protection Clause—or, more likely, in the political process.

The appellant in *Parkersburg*, like petitioner here, protested that the exorbitant wharfage fee was a tonnage duty in disguise, but the Court dismissed this attempt to recharacterize the ordinance: "The allegations of the bill that it is not real wharfage, but a duty of tonnage, in the name and under the pretext of wharfage, cannot be received against the terms of the ordinance itself." 107 U.S. at 695. "[I]ntent," the Court emphasized, "is not material" to whether a fee constitutes an impermissible duty of tonnage. *Id.* Any other rule would "open the door to an inquiry, in every case of wharfage alleged to be unreasonable, which would lead to great inconvenience and confusion" because neither courts nor juries "would have any practicable criterion by which to judge of the secret intent with which the charge was made, whether as wharfage or as a duty of tonnage." *Id.*

These same "inconvenience[s]" would follow from petitioner's proposed nondiscrimination rule. In each case, courts would be required to peer into the legislative mind in a futile effort to determine whether the lawmakers truly intended to enact a (permissible) *ad valorem* tax on vessels as property or instead harbored a "secret intent" to enact an (impermissible) duty on the vessels as "instruments of commerce" under the guise of a property tax. Such an intent-based inquiry is both "immaterial" to a tax's constitutionality under the Tonnage Clause (*Parkersburg*, 107 U.S. at 695), and inherently elusive. *See*, *e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464, 468-70 (1981) (discerning the motivation of a legislative body is always a "hazardous matter"). It also would require courts to draw imprecise boundaries between discriminatory and nondiscriminatory taxes based on how many and what kinds of other property a jurisdiction chose to tax. Particularly in the absence of any textual or historical support, this Court should not adopt such a radical (and unadministrable) approach to the Tonnage Clause. Instead, as in *Parkersburg*, the Court's analysis should begin and end with the "the terms of the ordinance itself"—an *ad valorem* property tax that did not impose any "charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory*, 296 U.S. at 265-66.

d. Finally, unable to locate any meaningful support for its nondiscrimination rule in this Court's Tonnage Clause decisions, petitioner turns to a different constitutional provision: the Import-Export Clause. *See* U.S. Const. art. I, § 10, cl. 2. Petitioner claims that the Import-Export Clause prohibits *ad valorem* property taxes that apply discriminatorily to imports or exports, and that the Court should import

that nondiscrimination rule to the Tonnage Clause. Pet. Br. 19-21.

Even if the Import-Export Clause does contain the broad nondiscrimination principle urged by petitioner, it is difficult to see how the City's property tax could conceivably have violated that principle. Both on its face and in practice, the City's tax applied equally to in-state and out-of-state vessels. Indeed, the City's tax applied to petitioner's vessels, which operate in several jurisdictions, in exactly the same manner as it applied to those operating exclusively in Alaska's waters. E.R. 273-74, 317, 565-72.

In any event, petitioner's attempt to append a nondiscrimination component to the Import-Export Clause nets it nothing. Petitioner relies primarily on a footnote from *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), involving what even petitioner concedes was a "hypothetical discriminatory tax on imports." Pet. Br. 25. The Court explained, in *dicta*, that a law taxing the retail sale of imported but not domestic goods would be "invalidated as a discriminatory imposition that was, in practical effect, an impost." *Michelin Tire*, 423 U.S. at 288 n.7.[5]

And even assuming that this Court intended to announce, in a footnote of *dicta*, a sweeping nondiscrimination principle applicable to the Import-Export Clause, *Michelin Tire* would have little bearing on

---

[5] Petitioner tries to transform this Court's analysis into a holding by counting the number of times that *Michelin Tire* and the later decision in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), used the word "nondiscrimination." Pet. Br. 20-21. But neither case presented the question whether an *ad valorem* property tax that fell only on imports or exports would violate the Import-Export Clause.

this Court's *Tonnage Clause* jurisprudence. The Import-Export Clause prohibits taxation of imports as imports and exports as exports (*see Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 757-59 (1978)), but the Tonnage Clause contains no similar limitation with respect to vessels. *See Wheeling*, 99 U.S. at 276 (unsuccessful argument that, "as shipping is put by the Constitution precisely upon the same footing as imports, any tax upon property, whilst it continues in the form of shipping, is as illegal as a tax upon property whilst it remains in the condition of imports"). Instead, the Tonnage Clause prohibits only particular types of fees—a duty based on the cubic capacity of a vessel, and perhaps also a charge for "entering or leaving a port, or navigating the public waters of the country" (*Huse*, 119 U.S. at 549-50)—that, as explained above, are fundamentally different from a property tax on vessels.

In short, petitioner can point to nothing in the text or purpose of the Tonnage Clause, or in this Court's precedent, that would require a municipality to tax non-vessels before it can levy a property tax on vessels. This Court should reject petitioner's effort to create such a rule *ex nihilo*.

II. THE CITY'S APPORTIONMENT FORMULA SATISFIED BOTH THE DUE PROCESS CLAUSE AND COMMERCE CLAUSE.

Petitioner contends that the City's apportionment formula—which apportioned the value attributable to each tax situs by dividing the number of productive days that a vessel spends in Port Valdez by the total number of days that it spends in all ports—violated the Due Process and Commerce Clauses because it "artificially inflate[d] the fraction of a ship's total value that is taxed by the City." Pet.

Br. 26. According to petitioner, the exclusion of days spent on the high seas from the denominator of the apportionment formula taxed value attributable to petitioner's domicile (California—which levied no tax on petitioner's vessels) and thereby created an unconstitutional risk of duplicative taxation. *Id.*

Petitioner's challenge to the City's apportionment formula fails on both counts. The City did not tax extraterritorially because it apportioned a vessel's value based on a factor—port days—that corresponds to the vessel's productive commercial activity in each tax situs. The risk of duplicative taxation posited by petitioner is similarly illusory because it rests on the erroneous propositions that property taxes must be apportioned by daily physical presence and that the State in which a vessel is domiciled possesses exclusive authority to tax the "time" that a vessel spends on the high seas. The City's tax satisfied both the Due Process Clause and the Commerce Clause.

A. The City Taxed Only That Portion Of A Vessel's Value Attributable To The Vessel's Productive Commercial Activities Within The City.

1. The Due Process Clause of the Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Clause does not immunize property used in interstate commerce from taxation, but instead imposes two specific limitations: There must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with the taxing State."

MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498, 1505 (2008) (quoting *Quill Corp.*, 504 U.S. at 306 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954), and *Moorman Mfg. v. Bair*, 437 U.S. 267, 273 (1978))) (internal quotation marks omitted).

Petitioner concedes that there was a sufficient connection between its vessels and Valdez so that the City had jurisdiction to tax the vessels as property—*i.e.*, that Valdez was a tax situs. Pet. App. 8a-9a. Instead, it argues only that the City's apportionment formula resulted in the taxation of value that was not reasonably related to Valdez.

It is well-settled that "a State may impose a property tax upon its fair share of an interstate transportation enterprise." *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968). In determining its "fair share" of such an enterprise, a State or municipality has "wide latitude" to "selec[t]" an apportionment formula that fairly divides the property's value among each tax situs. *Moorman*, 437 U.S. at 274. This grant of discretion to local taxing jurisdictions reflects both the Court's recognition that "the problem [of apportionment] is incapable of precise and arithmetical solution" (*Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 365 (1940)), and its desire to avoid the "essentially legislative" step of adopting a "single constitutionally mandated method" for apportioning the value of interstate property. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (internal quotation marks omitted).

An apportionment method is invalid only if it is "out of all appropriate proportion to the business transacted . . . in th[e] State" (*Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135

(1931)), or leads to a "grossly distorted result." *Norfolk & W. Ry.*, 390 U.S. at 326. The taxpayer challenging an apportionment formula bears a "heavy burden" (*id.*) and must present "clear and cogent evidence" that the tax is grossly disproportionate to in-state value. *Moorman*, 437 U.S. at 274 (internal quotation marks omitted).

2. The Alaska Supreme Court correctly held that the City's port-day apportionment formula permitted the City to tax only that portion of a vessel's value that was fairly attributable to its productive commercial activity within the City.

The City's port-day formula allocated the value of a vessel among all tax situses in relation to the productive time that the vessel spends in each tax situs on the eminently sensible supposition that a vessel's productive commercial activity corresponds closely to the productive time in port. In this manner, the City ensured that the proportion of a vessel's value apportioned to the City reasonably approximated the proportion of the vessel's commercial activity that was conducted in the City. For example, in 2000, petitioner's vessels spent approximately one-quarter of their total port time in Port Valdez, where they loaded all of the oil that they subsequently transported to other port facilities. Under the port-day apportionment formula, the City imposed a tax on approximately one-quarter of the vessels' value. Apportioning one-quarter of a vessel's value to the municipality in which the vessel spent one-quarter of its dock time—and where it loaded *all* of its commercially valuable cargo—cannot conceivably be viewed as a "grossly distorted result." *Norfolk & W. Ry.*, 390 U.S. at 326.

Indeed, the Court has already approved a similar port-day apportionment formula. In *Luckenbach Steamship Co. v. Franchise Tax Board*, 219 Cal. App. 2d 710 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964), the California District Court of Appeal upheld a port-day formula that apportioned a vessel's income based on the number of days in California ports divided by the number of days in all ports. *Id.* at 720-21. The taxpayer appealed the decision to this Court, challenging the port-day apportionment formula on Commerce Clause and due process grounds. This Court dismissed the taxpayer's appeal "for want of a substantial federal question" (*Luckenbach v. Franchise Tax Bd.*, 377 U.S. 215 (1964)), which is a disposition on the merits (*Hicks v. Miranda*, 422 U.S. 332, 344 (1975)) that is entitled to "precedential weight." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 150 n.20 (1986); *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (a dismissal "for want of a substantial federal question" "reject[s] the specific challenges presented in the statement of jurisdiction").

Petitioner nevertheless contends that, by excluding days on the high seas from the denominator, the port-day formula allowed the City to tax a vessel for part of the "time" it spent on the high seas and thus resulted in the taxation of the vessel at a rate that exceeded the vessel's "actual presence within the City's territorial jurisdiction." Pet. Br. 26-28. Although petitioner professes to disavow any suggestion that "the Constitution permits only one method of measuring actual presence" (*id.* at 37), petitioner is essentially seeking a new constitutional rule that would foreclose the City from apportioning a vessel's value on any basis other than the vessel's proportionate physical presence in Valdez.

This Court has never required taxing jurisdictions to employ a particular formula to calculate in-state taxable values. *Goldberg*, 488 U.S. at 261. To the contrary, a State or municipality may employ *any* apportionment method it chooses so long as the method does not reach "beyond that portion of value that is fairly attributable to economic activity within the taxing [jurisdiction]." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). Thus, the Court has approved a range of apportionment formulas for both property taxes and income taxes based on factors that include not just the duration of the property's physical presence within the taxing jurisdiction but also the commercial value generated by the property within the jurisdiction.[6]

In *Great Northern Railway Co. v. Weeks*, 297 U.S. 135, 142 (1936), for instance, this Court approved an apportionment formula for railroad property that averaged the proportion of "gross earnings"

---

[6] *See*, *e.g.*, *Rowley v. Chicago & N.W. Ry. Co.*, 293 U.S. 102, 108-09 (1934) (multi-factor tax formula for taxing railroad property that considered mileage traveled, use of rolling stock, and gross and net operating revenues); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983) (three-factor income tax formula based on payroll, property, and sales); *Moorman*, 437 U.S. at 273 (single-factor income tax formula based on sales); *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169, 173 (1949) (property tax formula for vessels that considered total number of miles traveled in Louisiana against total number of miles traveled everywhere); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 19 (1891) (similar mileage-based formula for railroads). The Court has not maintained a strict dichotomy between property taxes and income taxes in deciding questions of apportionment, and has relied on income tax precedents in deciding property tax cases (*see*, *e.g.*, *Norfolk & W. Ry.*, 390 U.S. at 326) and vice versa. *See*, *e.g.*, *MeadWestvaco*, 128 S. Ct. at 1506.

attributable to the State with several other metrics. Since a "single-factor formula is presumptively valid" (*Moorman*, 437 U.S. at 273), the City could have adopted an apportionment method based solely on the percentage of revenue generated by the vessels' activities in Valdez. This formula would have resulted in a much larger apportionment percentage than the 26% that petitioner claims is unconstitutionally excessive. Pl.'s Alaska S. Ct. Br. 28 n.73. It would also have been even less tied—indeed, barely related—to the "physical presence" measure that petitioner would enshrine as the sole permissible metric.

Similarly, Valdez could have employed a formula similar to the one discussed by this Court in *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 593 n.4 (1954), and still used by the State of Nebraska, Neb. Rev. Stat. § 77-1245, which apportions the value of aircraft based on the in-state percentages of (1) take-offs and landings, (2) passengers and cargo, and (3) revenue originated. (Wisconsin applies a similar formula. *See* Wis. Stat. § 76.07(4g)(b).) This formula likely would have attributed over 60% of the tankers' value to Valdez, but more importantly it would bear little relationship to actual physical presence in the City.[7]

---

[7] If petitioner's tankers called, on average, on two refineries for every visit to Valdez—which is consistent with the fact that the vessels typically had only one or two American tax situses other than Valdez, *see* J.A. 21-45—then the appropriate apportionment ratio would have been 61%: (1) 1/3 of their arrivals and departures in Valdez, (2) 1/2 of their oil handled in Valdez (and the other half divided among the refineries to which that oil was delivered), and (3) perhaps 100% of their revenue originating in Valdez, where they loaded all of the oil.

If petitioner were correct that the City's tax is unconstitutional because it did not apportion value based on average physical presence during the year, then these other commonly used apportionment formulas also would be invalid.

Petitioner invokes several of this Court's decisions in the railroad tax context to argue that the only permissible apportionment method for movable property is one based on the property's "actual proportionate presence within the taxing jurisdiction." Pet. Br. 34-37 (citing *Norfolk & W. Ry.*, 390 U.S. at 317; *Johnson Oil Ref. Co. v. Oklahoma*, 290 U.S. 158 (1933); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919)). No such rule emerges from those cases. And even if it did, the rule would make little sense in the context of ocean-going vessels.

In each of these cases, the issue was how to determine the percentage of a railroad company's rolling stock that could be taxed in a particular State. Because the "individual cars" were "constantly running in and out of each State," this Court allowed States to divide the rolling stock based on averages: "When individual items of rolling stock are not continuously the same but are constantly changing . . . , this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." *Johnson Oil Ref.*, 290 U.S. at 162; *see also Union Tank Line*, 249 U.S. at 282 (noting the Court's approval of "methods of appraisement producing results approximately correct"). Thus, in *Johnson Oil Refining*, the Court resolved this "situs" inquiry (290 U.S. at 161-62) by allowing Oklahoma to "tak[e] the number of cars which on the average were found to be physically present within the State." *Id.* at 163.

In *Norfolk & Western Railway* and *Union Tank Line*, in turn, the Court used this averaging technique as a benchmark to evaluate alternative, mileage-based methods for assessing value. *Norfolk & Western Railway* held that Missouri's mileage-based assessment on the taxpayer's railroad property was "grossly distorted" because it attributed a much greater percentage of the rolling stock to Missouri than was on average employed in the State. 390 U.S. 326-27. But even that decision explained that, given "the practical difficulties involved," the Constitution does not require "any close correspondence between the result of computations using the mileage formula and the value of property actually located in the State." *Id*. at 327. And in *Union Tank Line*, the Court invalidated a mileage-based assessment that did not result in "even approximate accuracy" because it assessed in-state value at many times the "average number of cars within Georgia." 249 U.S. at 283.[8]

These cases did not address the quite different inquiry here: how to apportion the value of a particular piece of property among several States in which that specific property had acquired tax situses. And they certainly did not hold that any such apportionment must correspond precisely to the property's physical presence in the taxing jurisdictions.

---

[8] Petitioner's reliance on *Fargo v. Hart*, 193 U.S. 490 (1904), also is misplaced. In *Fargo*, this Court held only that a tax assessment was invalid because, in apportioning the value of the taxpayer's personal property within the State, Indiana took account of wholly separate personal property that was owned by the taxpayer outside the State and that was unconnected with the in-state business. *Id.* at 500-01.

But even if the cases on which petitioner relies had imposed such a requirement with respect to *railroad* equipment, there is little reason to extend that requirement to ocean-going vessels. Railroad equipment is *always* in some physical location that potentially has authority to tax it. *See Cent. R.R. Co. v. Pennsylvania*, 370 U.S. 607, 611 n.4 (1962). In contrast, vessels by definition spend a portion of their activity on the high seas and thus "outside the taxing jurisdiction of any State." Pet. Br. at i. Because the purpose of apportionment analysis is to "slic[e] a taxable pie among several States in which the taxpayer's activities contributed to taxable value" (*Jefferson Lines*, 514 U.S. at 186), it makes little sense to adopt a constitutional rule that requires States to consider time on the high seas—when a vessel is not in any *State* "contribut[ing] to taxable value"—in allocating value among the various tax situses.

This Court has never imposed such an inflexible approach to apportionment, and it should not do so now. Valdez reasonably apportioned the value of a vessel in accordance with the proportion of the vessel's productive commercial activity that was conducted in Valdez. *See Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U.S. 217, 226 (1908) ("[T]he commercial value of property consists in the expectation of income from it."). Due process requires no more.

3. But even if petitioner were correct that the *only* permissible apportionment metric for *any* movable property is average physical presence during the year, it is incorrect that Valdez must specifically have excluded time spent on the high seas to avoid taxing "extraterritorial values." Pet. Br. 28.

Petitioner acknowledges that, on its view, the domicile State could tax "*all* the value for periods when there is no established tax situs," including time that the vessel spends on the high seas. Pet. Br. 33 (emphasis in original). But this time on the high seas is no more spent in the vessel's domicile than it is in Valdez. If petitioner were correct that the time must be separately apportioned, it would be "extraterritorial valu[e]" with respect to *every* State—and thus, on petitioner's view, taxable by none of them.

The Court has repeatedly held, however, that a domicile State can tax at full value property that has acquired no other tax situs—"even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back." *New York ex rel. N.Y. Cent. & Hudson River R.R. Co. v. Miller*, 202 U.S. 584, 597 (1906). In *Miller*, for instance, the Court held that the full value of a railroad's rolling stock could be taxed by its domicile State because "the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *Id.*

This rule applies with equal force when property is subject to taxation in multiple tax situses. The property's "occasional excursions to foreign parts" do not deprive the tax situses of their collective authority to tax the full value of the property. The only issue is how to "slic[e] a taxable pie among several States in which the taxpayer's activities contributed to taxable value" (*Jefferson Lines*, 514 U.S. at 186), which the City's tax reasonably did by looking at the relative time spent in the competing tax situses.

Thus, although petitioner couches its argument in terms of "extraterritorial" taxation, it is challenging only the allocation of taxing authority between a domicile State and other tax situses. Even petitioner acknowledges that, if the vessels had been domiciled in Valdez, the apportionment formula undoubtedly would have been constitutional. *See* Pet. Br. 33 (arguing that the domicile State may tax "*all* the value for periods when there is no established tax situs" (emphasis in original)). There is no constitutional basis for petitioner's apparent belief that precisely the same apportionment formula could be constitutional if adopted by a domicile but unconstitutional if adopted by any other tax situs.[9]

Petitioner attempts to justify its novel constitutional theory by asserting—without supporting authority or even explanation—that "only the domicile State . . . provides the benefits and protections that justify taxation" of time on the high seas. Pet. Br. 39-40. But non-domiciliary tax situses often provide no fewer benefits and protections than the domicile State.

---

[9] Accordingly, the fact that the value taxed by the City would vary based on the number of days that a vessel spent in other ports (even where the number of days spent in the City is held constant) does not suggest that the City taxed extraterritorial value. It instead reflects the fact that the "taxable pie" must be "slic[ed]" differently depending on a vessel's total port days to reflect each taxing jurisdiction's share of the vessel's productive activity and to ensure that the vessel's full value is taxed. *Jefferson Lines*, 514 U.S. at 186. The City's share of a vessel's productive activity—and hence its share of taxable value—would be significantly greater, for example, if the vessel spent 10 days in the City, 5 days in other ports, and 350 days at sea, than if it spent 10 days in the City, 50 days in other ports, and 305 days at sea.

Take, for example, vessels (like petitioner's) that never visit their domicile port. The benefits and protections that the vessels receive when docked—including docking and maintenance facilities and onshore services for their crews—are provided exclusively by non-domicile States. And these benefits and protections often extend to the vessel's activities on the high seas. For example, the City provides emergency response services to the oil shippers, directs traffic away from security zones in Prince William Sound, and builds and maintains docking facilities for vessel repair that enable vessels to remain in operation. All of these services promote the profitability of petitioner's interstate transportation enterprise and enable petitioner to operate its vessels between ports.

There is no reason to believe that these services are any less substantial than whatever "benefits and protections" the domicile State provides while the vessels are on the high seas. As Justice Jackson explained in the analogous context of a state tax on airplanes, "[t]he planes have received no 'protection' or 'benefit' from [the domicile State] that they have not received from many others. . . . [N]o distinction whatever can be pointed out between those [benefits and protections] extended by [the domicile State] and those extended by any state where there is a terminal or a stopping place." *N.W. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 304-05 (1944) (Jackson, J., concurring); *see also Braniff Airways*, 347 U.S. at 602.

Unsurprisingly, petitioner cannot point to any decision of this Court concluding that a domicile State is entitled to special weight in the apportionment analysis because it provides greater benefits and protections than other tax situses. Instead, this Court has held only that, "[i]f such property has had

insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a 'tax situs,' it is surely appropriate to *presume* that the domicile is the only State affording the 'opportunities, benefits, or protection' which due process demands as a prerequisite for taxation." *Cent. R.R.*, 370 U.S. at 612 (emphasis added). But whatever the merits of this presumption when the domicile State is the *only* tax situs, there is no reason to believe it holds equally when the domicile State is only one of several situses that provide benefits and protections to the property. There is, at the very least, no basis for adopting as *constitutional* law a presumption that the benefits and services provided by the domicile State so greatly outnumber the benefits and services provided by any other situs that the domicile—and only the domicile—can tax activity on the high seas.

B. The City's Apportionment Formula Did Not Create A Risk Of Duplicative Taxation.

1. The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. Although by its terms this grant of authority to the federal government does not impose any constitutional limitations on State or local taxes, this Court has invoked a so-called dormant or negative component of the Commerce Clause to prohibit taxes that "burden [interstate commerce] by subjecting activities to multiple or unfairly apportioned taxation." *MeadWestvaco*, 128 S. Ct. at 1505.

An apportionment formula raises constitutional concerns under this Court's dormant Commerce Clause precedents only if it permits "multiple taxation" of property that significantly burdens the abil-

ity of the taxpayer to engage in interstate commerce. *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *see also Moorman*, 437 U.S. at 276. An apportionment formula must not leave an interstate enterprise in a position substantially worse than if it had conducted its business in only one State. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402-04 (1984). Yet, consistent with the "wide latitude" States and municipalities have in the selection of appropriate apportionment formulas, not all overlapping taxation is unconstitutional. *Moorman*, 437 U.S. at 274. The Court has acknowledged that it is impossible to "mandate such precision in interstate taxation" (*id.* at 278), and has sustained a "number of [apportionment] formulas . . . even though it could not be demonstrated that the results they yielded were precise evaluations of assets located within the taxing State." *Norfolk & W. Ry.*, 390 U.S. at 324 (citing *Browning*, 310 U.S. at 365-66 (citing cases)).

2. Petitioner contends that the City's port-day apportionment formula created a risk of duplicative taxation because it purportedly permitted the City to tax a portion of the time that a vessel spends on the high seas—time that petitioner claims is taxable only by the vessel's domicile State. As discussed above, the City's apportionment formula was based exclusively on the vessel's productive commercial activities within the City, and there is no constitutional requirement that the City separately apportion (and then exclude) "time" on the high seas. Even if petitioner were correct that time on the high seas must be separately apportioned, however, it is wrong to claim that a domicile State possesses the exclusive authority to tax that time.

Petitioner's duplicative taxation argument rests principally on *Central Railroad Co. v. Pennsylvania*,

370 U.S. at 607. That decision does not vest a domicile State—either explicitly or implicitly—with the exclusive authority to tax time on the high seas. Instead, *Central Railroad* held only that the State in which movable property is domiciled can tax that property in full if the property has acquired *no other* tax situs. *Id.* at 612. Thus, railcars that Central Railroad used in its domicile State, Pennsylvania, and also in other States in which they did not acquire a tax situs, were subject to full taxation by Pennsylvania. *Id.* at 614.

Central Railroad did *not* hold, however, that a domicile State retains the exclusive authority to tax property for time that it spends outside of any tax situs when the property in question has acquired a tax situs both in the domicile State and in another State. On the contrary, the Court imposed concrete limitations on the taxing power of a domicile State. For example, the Court invalidated Pennsylvania's effort to tax the full value of railcars that had also acquired a tax situs in New Jersey because New Jersey possessed the right to impose "an apportioned ad valorem tax" on those railcars. *Cent. R.R.*, 370 U.S. at 613 (emphasis omitted).

The Court explained that a "domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere." *Cent. R.R.*, 370 U.S. at 614 (emphasis omitted). Thus, far from establishing that a domicile State may tax all time that an ocean-going vessel spends outside of any tax situs, *Central Railroad* indicates that fair apportionment among all tax

situses is required *whenever* property is amenable to taxation by more than one jurisdiction.[10]

Indeed, reading *Central Railroad* to afford a "super" taxing authority to domicile States would be fundamentally at odds with the decision's reasoning. The Court's holding that a domicile State may tax the full value of property with no other tax situs was premised on the Court's concern that a contrary rule would permit some property to "escape . . . taxation entirely" (370 U.S. at 617), and on the commonsense proposition that, when no other tax situs exists, the domicile is "the only State affording the 'opportunities, benefits, or protection' which due process demands as a prerequisite for taxation." *Id.* at 612 (quoting *Ott*, 336 U.S. at 174). But, as the Court also recognized, these concerns evaporate when property

---

[10] Petitioner claims to find support for its theory of expansive domiciliary taxing power in *Central Railroad*'s statement that the Due Process Clause does not "'confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders.'" Pet. Br. 42 (quoting *Cent. R.R.*, 370 U.S. at 612). But the context of this statement reveals that the Court was referring to a domicile State's authority to tax "property [that] has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a 'tax situs'" (*Cent. R.R.*, 370 U.S. at 612), not to the scope of a domicile State's authority when the property is also subject to taxation in at least one other State. Indeed, the Court drew a sharp distinction between Pennsylvania's authority to tax cars that had acquired a situs in New Jersey and those that had acquired no other situs. *Id.* at 614 ("We conclude . . . that on the record before us Pennsylvania was constitutionally permitted to tax, at full value, the remainder of appellant's fleet of freight cars . . . . These . . . did not run 'on fixed routes and regular schedules' as did the cars used by CNJ.'").

has acquired a second tax situs: At that point, the domicile State is not the only jurisdiction that can tax the property and is not the only jurisdiction that provides protections and benefits to that property. Thus, where property has more than one tax situs, there is no longer any justification for affording the domicile State the exclusive authority to tax time that the property spends outside of any taxing jurisdiction—the non-domiciliary situs is also available to tax that time and is providing protections and benefits to the property that may be equal to, or more extensive than, those provided by the domicile State itself.

Petitioner's effort to imbue domicile States with special taxing authority is nothing more than an attempt to resurrect a modified version of the "home port" doctrine, which generally reserved to a vessel's domicile State the exclusive authority to tax its value. *See Hays v. Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596, 599 (1854). As petitioner acknowledges (at 19 n.8), that common-law doctrine has since "yielded to a rule of fair apportionment" among all tax situses (*Japan Line, Ltd. v. L.A. County*, 441 U.S. 434, 442 (1979)), and should not be revived under the guise of petitioner's theory that domicile States retain the exclusive right to tax time on the high seas.[11]

3. Aside from lacking any precedential support, petitioner's approach to apportionment is also practi-

---

[11] Although the Court has never expressly rejected the "home port" doctrine for ocean-going vessels, whatever rationale may exist for retaining the doctrine with respect to vessels regularly engaged in foreign commerce (*Japan Line*, 441 U.S. at 442) is inapplicable to petitioner's vessels, which are predominantly engaged in commerce among the States.

cally flawed because it would invariably result in the *undertaxation* of ocean-going vessels.

Under *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905), a domicile State may not tax the personal property of residents that is "permanently located in other states." *Id.* at 201; *see also Miller*, 202 U.S. at 596-97. This is precisely the situation for those oil tankers—including many of the tankers that dock at the City—that spend all of their time either in non-domicile ports or on the high seas. Indeed, petitioner invokes the example of SeaRiver, an oil shipping company domiciled in Texas that regularly docks vessels in the City. Pet. Br. 7. SeaRiver's oil tankers have never actually been to Texas: They were not built there, they are not repaired there, and they never make port there. Texas therefore cannot impose a property tax on those vessels because they are "permanently located" outside the State. *Union Refrigerator Transit*, 199 U.S. at 195-97. According to petitioner, however, neither may a non-domicile State tax the vessels during any of the time they spend on the high seas.

Petitioner's attempt to create special taxing authority for domicile States would therefore create a vast tax loophole: In those instances in which a vessel operates permanently outside of its domicile State, *no* jurisdiction would possess authority to tax the vessel's value during time on the high seas. This rule may well suit petitioner—its vessels *never* visit Texas, which is currently petitioner's domicile State, and thus would remain insulated from taxation during their time on the high seas—but this result is surely not in keeping with *Central Railroad*'s commitment to the preservation of state taxing authority over the *full* value of property. If, as *Central Railroad* indicates, the authority to tax the full value of

property must always be vested in some jurisdiction (or combination of jurisdictions), then the domicile State cannot possess the exclusive authority to tax time on the high seas where a vessel has acquired a tax situs in other States.

C. Petitioner's Argument That The Valdez Tax Should Have Accounted For Repairs Or Strikes Is Not Properly Before The Court And Is Meritless In Any Event.

Petitioner further contends that the port-day apportionment formula was unconstitutional because it did not account for the time that a vessel spends in dry dock or out of service due to a strike. Pet. Br. 47. These arguments are not properly before the Court, and, in any event, fail on the merits.

Petitioner sought and obtained certiorari on whether the Commerce Clause and Due Process Clause permit taxation for time that a vessel spends "*outside* the taxing jurisdiction of any State." Pet. Br. at i (emphasis added). But petitioner now argues that, by excluding dry dock and strike time from the denominator of its apportionment formula, "Valdez is effectively taxing vessels for a portion of the period that they are . . . physically located *in . . . other taxing jurisdictions*." *Id.* at 48 (emphasis added). Indeed, a premise of petitioner's duplicative taxation argument is that "other jurisdictions plainly are entitled to levy property tax on the vessels during these same periods" when vessels are "in some other port for repair (or because of labor unrest)." *Id.* at 41.

Because this dry dock and strike time is not necessarily "outside the taxing jurisdiction of any State," it is not encompassed within the question presented. Nor, for that matter, was it even raised as a separate

issue in the body of the petition for certiorari, which addressed only time spent on the high seas. This Court should not condone petitioner's belated effort to raise new issues.[12]

In any event, there is no merit to petitioner's challenge to the exclusion of dry dock and strike time from the denominator of the City's apportionment formula. This is a tax refund action, but petitioner does not claim that any of its vessels was subject to taxation in another jurisdiction—let alone *taxed* by that jurisdiction—because of time that it spent in dry dock or on strike. To the contrary, petitioner typically dry-docks its vessels in Asia (E.R. 190), where they are likely immune from property taxation since "[o]ceangoing vessels . . . are generally taxed only in their nation of registry." *Japan Line*, 441 U.S. at 447 n.11.

To the extent that any of petitioner's vessels were to become subject to taxation in another jurisdiction because of time spent in dry dock or because of a strike, the appropriate recourse would be to "petition" the City Assessor to "use . . . another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions." Pet. App. 56a. Until then, any decision by this Court would prematurely address constitutional issues that could well be avoided by the City's administrative process.

But even if this Court were somehow to reach the issue, it should conclude that the City reasonably

---

[12] Indeed, it would be particularly inappropriate for this Court to consider strike time because petitioner failed to raise that issue before the Alaska Supreme Court. *See*, *e.g.*, *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

adopted an apportionment formula that allocates value based on the commercial activity occurring while a vessel is in port. Because any time the vessel spends out of service in dry dock or on strike is not productive, this time is necessarily excluded from the formula.

Petitioner acknowledged below that the City could have allocated the vessels' value based on "voyage miles"—that is, miles traveled in Valdez divided by total miles traveled. *See* E.R. 97 n.45. This formula would have attributed no value to dry-dock or strike time, but that does not mean the formula results in unconstitutional distortion. Instead, it merely reflects a choice committed by this Court to the discretion of the taxing authority about how best to measure and allocate the property's activity.

CONCLUSION

The judgment of the Supreme Court of Alaska should be affirmed.

Respectfully submitted.

WILLIAM M. WALKER
DEBRA J. FITZGERALD
CRAIG W. RICHARDS
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

February 25, 2009